

State of Michigan
In the Supreme Court

People of the State of Michigan,
Plaintiff-Appellee,

v

Melvin Howard,
Defendant-Appellant.

Supreme Court
No. 153651

Court of Appeals
No. 324388

Lower Court
No. 13-1442FH

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Plaintiff-Appellee's Brief Opposing the Application for Leave to Appeal

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Counterstatement of Judgment Appealed From and Relief Sought

The Court of Appeals issued an unpublished opinion on March 8, 2016, articulating that Defendant implicitly consented to the declaration of a mistrial after the first trial, that implicit consent to mistrial renders subsequent double jeopardy challenges meritless, and that although evidence of Defendant's previous arrests should not have been admitted, the mistaken admittance did not affect Defendant's right to a fair trial.

Defendant-Appellant has timely applied for leave to appeal to this Court. None of Defendant's current arguments succeeded in the Court of Appeals, and none warrant this Court's review. Therefore, the People of the State of Michigan respectfully request that this Court deny Defendant-Appellant's Application for Leave to Appeal.

Counterstatement of Questions Presented

I. During Defendant's first trial, the prosecution alerted the trial court and Defendant that Ms. Street provided false testimony regarding two distinct facts. Then, after an off-the-record in-chambers discussion with both attorneys, a warning to Ms. Street about her uncooperative behavior, an off-the-record bench discussion, and an on-the-record discussion, the court decided that the testimony would taint the jury to the degree that it would deprive both parties a fair trial. Was a mistrial properly declared?

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

The Court of Appeals answered, "Yes."

The trial court answered, "Yes."

II. Defense counsel reasonably sought jury acquittals in both trials, but did not raise the double jeopardy objection until the sentencing hearing following the second trial. Defendant is therefore deemed to have implicitly consented to the declaration of mistrial in the first trial, rendering a double jeopardy challenge meritless. Was defense counsel effective?

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

The Court of Appeals answered, "Yes."

The trial court did not answer.

III. Evidence of the victim's out-of-court photo identification of Defendant was relevant and probative to the final outcome of the case. Inadvertent admission of Defendant's prior arrest was, while improper, a harmless mistake that did not affect Defendant's right to a fair trial. Defense counsel strategically declined to object to the evidence in order to avoid drawing unwanted attention. Was defense counsel effective?

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

The Court of Appeals answered, "Yes."

The trial court did not answer.

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Counterstatement of Facts

On July 6, 2013, the victim attended a get-together at her friend Sharonda Street's apartment in Ypsilanti. Prior to the get-together, the victim and Ms. Street walked to a store across the street from Ms. Street's apartment complex to purchase pop and cigarillos. The two intended to use the cigarillos to smoke marijuana.¹

At the store the victim ran into an old friend she had not seen in almost four years. Defendant and another male accompanied the victim's friend. After catching up with her friend, the victim decided to exchange numbers with Defendant in order to invite the three males to the get-together at Ms. Street's apartment. The victim then returned to Ms. Street's apartment. Ms. Street had returned slightly before the victim because she did not want to wait for the victim to catch up with her friend.²

Once the three males arrived at Ms. Street's apartment, the group collectively decided to purchase alcohol. After the third male purchased the alcohol and returned to the apartment, the group went into Ms. Street's bedroom to smoke marijuana and consume the alcohol.³

While at the get-together, the victim only spoke with Defendant casually. She never spoke with him alone. The victim never exhibited any interest in Defendant. She neither flirted nor showed him any photographs on her phone.⁴

The victim drank four double shots of vodka and smoked the equivalent of a joint of marijuana in the span of 30 minutes. As a result, she began to feel quite

¹ Jury Trial, 06/30/2014, pp 121-122.

² Jury Trial, 06/30/2014, pp 124-128.

³ Jury Trial, 06/30/2014, pp 131-132.

⁴ Jury Trial, 06/30/2014, p 139.

intoxicated and nauseated. In response, she dismissed herself and went to the bathroom to throw up because she thought it would make her feel better. She then returned to bedroom momentarily before heading back to the bathroom to throw up again.⁵

After vomiting the second time and still feeling intoxicated, the victim went into the apartment common area to sleep on the couch. The victim was awakened some point thereafter to the feeling of Defendant's penis inside her vagina. She was lying on her back and Defendant was on top of her. She was able to see a big star tattoo on Defendant's neck. The victim reacted by pushing him away. Then, she got up and said to him, "so you're just going to rape me?" To that Defendant responded, "it was just getting good."⁶

The victim was very upset as she realized that her pants and underwear had both been completely removed. She then got up from the couch and ran to Ms. Street's bedroom door, which she discovered was locked. The victim then knocked on the door and yelled for help to Ms. Street. Ms. Street, who had been asleep, did not immediately answer the door. While the victim waited for Ms. Street to open her door, she observed Defendant dress himself and run out of the apartment.⁷

The sexual assault occurred around 4 a.m. in the morning. At that time the victim immediately called 911. But she was still intoxicated, so she hung up the

⁵ Jury Trial, 06/30/2014, pp 135-138.

⁶ Jury Trial, 06/30/2014, pp 141-146.

⁷ Continued Jury Trial, 07/01/2014, pp 7-9.

phone before speaking to the operator. After the short phone call, the victim lay back down and fell asleep in Ms. Street's bedroom.⁸

After the victim awoke, she called 911 again. Police officers and an ambulance responded in less than 20 minutes. The victim was upset at the entire situation, but she was able to give the police officer a physical description of Defendant.⁹

The victim was then transported to the St. Joseph Mercy's hospital in the ambulance. But due to the long wait time, she left without seeing the special nurse who does sexual assault examinations. She thought the process was too long, and she felt nasty since she could not take a shower. Afterward, the victim went home to her mother's house. After speaking with her mother, she decided to go back to the hospital. Later that day, the victim went to the Ypsilanti Police Station and spoke with the investigating police officer again. This time she gave a more detailed description of what had happened.¹⁰

At a later time, Defendant's mother called the victim and offered her \$3,000. The victim was angered by the offer and refused it. She received multiple similar calls from Defendant's family members after that.¹¹

On March 24, 2014, Defendant, Melvin Earl Howard, was tried before a jury for Criminal Sexual Conduct Third Degree. At that trial, however, Ms. Street gave false testimony on two distinct facts. First, she stated that someone purchased

⁸ Continued Jury Trial, 07/01/2014, pp 9-10.

⁹ Continued Jury Trial, 07/01/2014, pp 12-14.

¹⁰ Continued Jury Trial, 07/01/2014, pp 15-19.

¹¹ Continued Jury Trial, 07/01/2014, pp 25-26.

liquor at Campus Corner, but the reality is that Campus Corner does not sell liquor, only beer. Second, she testified on multiple occasions that she did not own a cellphone or a house phone, but a phone number belonging to Ms. Street was written on the police report on several occasions.¹²

The prosecution promptly brought Ms. Street's false testimony to the court's attention. Then, after an off-the-record in-chambers discussion with both attorneys, a warning to Ms. Street about her uncooperative behavior, an off-the-record bench discussion, and an on-the-record discussion, the trial court decided that the testimony would taint the jury to the degree that it would deprive both parties a fair trial; therefore, a mistrial was declared.¹³ Defendant was then retried on June 30, 2014, and July 1, 2014. At the retrial, Defendant was found guilty of Criminal Sexual Conduct Third Degree. As a result, Defendant was sentenced to serve a minimum of 5 years and a maximum of 15 years in the Michigan Department of Corrections.¹⁴

Defendant then appealed to the Court of Appeals on double jeopardy grounds. The People agreed that jeopardy had attached before the conclusion of the original trial. Instead, The prosecution argued that Defendant implicitly consented to the mistrial, therefore, waiving his double jeopardy rights. The Court of Appeals' majority opinion concurred with that argument.¹⁵ Furthermore, Judge O'Brien concurred in the majority opinion to express her belief that not only did Defendant

¹² Jury Trial, 03/24/2014, p 236-237.

¹³ Jury Trial, 03/24/2014, p 238.

¹⁴ Sentencing, 09/2/2014, p 24.

¹⁵ *People v Howard*, unpublished opinion per curiam of the Court of Appeals, issued March 8, 2016 (Docket No. 324388), p 5-6.

implicitly consent to the declaration of a mistrial, but that there was a manifest necessity for the declaration in the first place.¹⁶ Defendant now applies to this Court for leave to appeal.

¹⁶ *Howard*, unpub op at 1-2 (O'Brien, J., concurring).

Argument

I. During Defendant's first trial, the prosecution alerted the trial court and Defendant that Ms. Street provided false testimony regarding two distinct facts. Then, after an off-the-record in-chambers discussion with both attorneys, a warning to Ms. Street about her uncooperative behavior, an off-the-record bench discussion, and an on-the-record discussion, the court decided that the testimony would taint the jury to the degree that it would deprive both parties a fair trial; therefore, a mistrial was declared.

Standard of Review

Double jeopardy issues raise questions of constitutional law that appellate courts review de novo.¹⁷

A trial court's decision to declare a mistrial is reviewed for an abuse of discretion. An abuse of discretion occurs when a trial court's decision is outside the range of principled outcomes.¹⁸ "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial."¹⁹

Additionally, because Defendant's trial counsel failed to object to trial court's decision to schedule the second trial, this issue was not preserved. Therefore, Defendant must show a plain error that affected his substantial rights and this Court must exercise its discretion when deciding whether review is necessary.²⁰

¹⁷ *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007) citing *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

¹⁸ *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

¹⁹ *Id.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

²⁰ *People v Carines*, 460 Mich 750, 763-774; 597 NW2d 130 (1999).

Discussion

The protection against double jeopardy is a right guaranteed in both the United States and Michigan Constitutions.²¹ Pursuant to the Michigan Constitution, “[n]o person shall be subject for the same offense to be twice put in jeopardy.”²² “The purpose of the double jeopardy prohibition is to limit the state to having generally only one attempt at obtaining a conviction.”²³

In a jury trial, jeopardy attaches once the jury is empaneled and sworn.²⁴ It is therefore applicable before the conclusion of a trial.²⁵ If a trial ends before a verdict is rendered, such as where a mistrial is declared, the Double Jeopardy Clause may bar a retrial.²⁶ For example, when a trial court sua sponte declares a mistrial without a defense counsel’s consent or where a mistrial is declared as a result of a prosecutor’s provocation, retrial is generally permitted only when the mistrial was prompted by manifest necessity.²⁷

But the protection against double jeopardy does not automatically bar all criminal proceedings that end before a verdict is rendered.²⁸ For instance, if a defendant moves for or consents to a mistrial and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, a retrial is generally permitted.²⁹ Thus, an inquiry into the

²¹ US Const, Am V.

²² Const 1963, art 1, § 15.

²³ *People v Dawson*, 431 Mich 234, 250; 427 NW2d 886 (1988).

²⁴ *Id.* at 252.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 252, 236

²⁸ *Arizona v Washington*, 434 US 497; 98 S Ct 824; 54 L Ed 2d 717 (1978).

²⁹ *Dawson*, 431 Mich at 253.

manifest necessity of a retrial need not be made if the defense counsel is deemed to have consented to the retrial. This Court has held that consent to a retrial may be express or implied.³⁰ Furthermore, the United States Court of Appeals for the Sixth Circuit has held that consent may be implied if the circumstances surrounding the case “positively indicate [that] silence was tantamount to consent.”³¹

Looking at the facts of this case, the trial court correctly exercised its discretion when it declared a mistrial. The mistrial was declared after Ms. Street gave false testimony on two distinct facts. The prosecution promptly brought Ms. Street’s false testimony to the court’s attention. Then, after an off-the-record in-chambers discussion with both attorneys, a warning to Ms. Street about her uncooperative behavior, an off-the-record bench discussion, and an on-the-record discussion, the court decided that the testimony would taint the jury to the degree that it would deprive both parties a fair trial; therefore, a mistrial was declared.³²

Despite being “aware of the trial court’s concerns and the possibility that the trial court might declare a mistrial” and having “had the opportunity to do so during either of the off-the-record discussions, the prosecutor’s summary of the discussions, or the trial court’s remarks surrounding its declaration of a mistrial,” defense counsel made no effort to object to the trial court’s decision.³³ The Court of Appeals therefore deemed Defendant’s silence as constituting implied consent to the

³⁰ *People v McGee*, 469 Mich 956, 956; 670 NW2d 665 (2003).

³¹ *United States v Gantley*, 172 F3d 422, 429 (CA 6, 1999).

³² Jury Trial, 03/24/2014, p 238.

³³ *Howard*, unpub op at 6.

properly declared mistrial and waiver of his double jeopardy rights.³⁴ The Court of Appeals therefore rendered it unnecessary to determine whether the declaration was supported by manifest necessity.³⁵ For this reason, the declaration itself would also constitute a proper exercise of judicial discretion, which would make Defendant's double jeopardy argument invalid.³⁶ Indeed, if Defendant is allowed to present this issue on appeal, this Court would be allowing counsel to harbor error during the trial stage and then use that error as an appellate parachute.³⁷

A finding of a defendant's implied consent to a mistrial renders a manifest necessity inquiry unnecessary. Notwithstanding that fact, the trial court's decision to declare a mistrial in this case was prompted by manifest necessity. This Court has stated that "the general rule permitting the prosecution only one opportunity to obtain a conviction must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments."³⁸ In determining whether society's interest in fair and just trials creates a manifest necessity for the declaration of a mistrial, this Court simply determines "whether the trial court abused its discretion in finding manifest necessity."³⁹

A trial court has considerable deference in its decision regarding the existence of manifest necessity when deciding whether a mistrial is necessary.⁴⁰ Considering this case's unique facts, the trial court did not abuse its discretion by

³⁴ *Id.*

³⁵ *Id.*

³⁶ *People v Lett*, 466 Mich 206, 222 n 15-223; 644 NW2d 743 (2002).

³⁷ *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).

³⁸ *Lett*, 466 Mich at 215.

³⁹ *Lett*, 466 Mich at 220.

⁴⁰ *People v. Hicks*, 201 Mich.App 197, 200-201; 506 NW2d 269 (1993), rev'd in part on other grounds 447 Mich. 819 (1994).

declaring a mistrial, as it was a manifestly necessary. The prosecution promptly raised the issue with the concerning testimony, the record clearly shows that that testimony was the product of innocent conduct, and then, “after a thorough effort by the trial court to avoid declaring a mistrial” the trial court determined that the undisputedly false testimony tainted the jury to the extent that a fair trial was no longer possible “with respect to the victim and the defendant.”⁴¹ Thus, Judge O’Brien concluded that “the trial court did not abuse its discretion in concluding that a mistrial was manifestly necessary in this case.”⁴²

II. Defense counsel reasonably sought jury acquittals in both trials, but did not raise the double jeopardy objection until the sentencing hearing following the second trial. Defendant is therefore deemed to have implicitly consented to the declaration of mistrial in the first trial, rendering a double jeopardy challenge meritless. Defense counsel cannot be considered ineffective for failing to raise a meritless objection.

Standard of Review

Under the Sixth Amendment to the United States Constitution, a criminal defendant is guaranteed effective assistance of counsel.⁴³ Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. This Court reviews questions of constitutional law de novo.⁴⁴ Further, findings of fact by the trial court may not be set aside unless the decisions are clearly erroneous.⁴⁵

⁴¹ Howard, unpub op at 1-2 (O’Brien, J., concurring).

⁴² Id. at 2.

⁴³ US Const, Am VI.

⁴⁴ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁴⁵ MCR 2.613(C).

Defense counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.⁴⁶ When inquiring into whether a claim of ineffective assistance of counsel is valid, appellate courts have consistently adopted the two-prong test set forth by the United States Supreme Court in *Strickland*. Reviewing courts are to determine (1) whether counsel's performance was objectively reasonable, and (2) whether the defendant was prejudiced by counsel's defective performance.⁴⁷ "The first prong requires that counsel make errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The second "requires that counsel's ineffective assistance must be found to have been prejudicial in order to reverse an otherwise valid conviction."⁴⁸

Discussion

Both United States and Michigan Constitutional guarantees to effective assistance of counsel are generally not implicated absent some effect of the challenged conduct on reliability of the trial process. This is because the right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.⁴⁹ Further, Michigan law states that it is the defendant who, claiming ineffective assistance of counsel based on defective performance, has the burden of affirmatively demonstrating that

⁴⁶ *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012).

⁴⁷ *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

⁴⁸ *Vaughn*, 491 Mich at 664-665.

⁴⁹ *People v Mitchell*, 454 Mich 145, 152-153; 560 NW2d 600 (1997).

counsel's performance fell below the objective standard of reasonableness and that, but for the professional errors, there is a reasonable probability that the result of the proceeding would have been different.⁵⁰

A defendant can waive his or her constitutional rights, including the protection afforded by the Double Jeopardy Clause.⁵¹ Therefore, a defendant can be deemed to have waived the double jeopardy challenge and thus forfeited his right to make it when he fails to make a timely objection.⁵² Forfeiture is the failure to timely assert a right. Failure to object can deprive a "court of the opportunity to correct [an] error at the time it occurs."⁵³ Waiver is the "intentional relinquishment or abandonment of a known right."⁵⁴ "[U]nequivocal indications" that one approved of a course of action taken in the trial court constitute waiver.⁵⁵

In this case, Defendant challenges his defense counsel's failure to argue for an improper declaration of mistrial before the second trial. This argument, however, cannot stand. Defense counsel did not raise the issue of double jeopardy at the first or second trial. Instead, after reasonably seeking a jury acquittal in the second trial, he raised it in his motion during the subsequent sentencing hearing.⁵⁶ Defendant can therefore be deemed to have implicitly consented to waiving the double jeopardy challenge and forfeiting his right to make it after the conclusion of the first trial. And so "any motion by defense counsel to dismiss defendant's second trial on double

⁵⁰ *Id.* at 158.

⁵¹ *Dawson*, 431 Mich at 253.

⁵² See *In re Contempt of Dorsey*, 306 Mich App 571, 590; 858 NW2d 84 (2014).

⁵³ *Vaughn*, 491 Mich at 674.

⁵⁴ *Carines*, 460 Mich at 762.

⁵⁵ *Kowalski*, 489 Mich at 505.

⁵⁶ Sentencing, 09/02/2014, p 15.

jeopardy grounds would have been meritless in light of defendant's implied consent to the mistrial declaration."⁵⁷ Based on this reasoning, the Defendant's ineffective assistance of counsel argument fails, as "[d]efense counsel cannot be deemed ineffective for failing to raise a meritless objection."⁵⁸

III. Evidence of the victim's out-of-court photo identification of Defendant is relevant and probative to the final outcome of the case. Inadvertent admission of Defendant's prior arrest was, while improper, a harmless mistake that did not affect Defendant's right to a fair trial. Defense counsel strategically declined to object to the evidence in order to avoid drawing attention to it and was, therefore, not ineffective.

Standard of Review

Appellate courts review a trial court's decision on evidence admissibility for an abuse of discretion.⁵⁹ A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes.⁶⁰

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. This Court reviews questions of constitutional law de novo.⁶¹ Further, findings of fact by the trial court may not be set aside unless the decisions are clearly erroneous.⁶²

Discussion

The evidence being challenged here includes the victim's photo identification of Defendant as well as a police officer's inadvertent and unanticipated testimony about one of Defendant's prior arrests.

⁵⁷ Howard, unpub op at 6, 7.

⁵⁸ Howard, unpub op at 7 citing *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

⁵⁹ *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012).

⁶⁰ *Id.*

⁶¹ *LeBlanc*, 465 Mich at 579.

⁶² MCR 2.613(C).

Under the Michigan Rules of Evidence, evidence is admissible only if it is relevant as defined by MRE 401 and is not otherwise excluded under MRE 403. “Pursuant to MRE 401, evidence is relevant if two components are present, materiality and probative value.”

“Materiality is the requirement that the proffered evidence be related to ‘any fact that is of consequence’ to the action.”⁶³ When examining whether the proffered evidence is probative, a court considers whether the “evidence tends ‘to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,’” and “[t]he threshold is minimal: ‘any’ tendency is sufficient probative force.”⁶⁴

Moreover, MRE 403 excludes evidence, even if relevant, only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. In other words, MRE 403 does not exclude prejudicial evidence; instead, it only excludes evidence that is unfairly prejudicial. Evidence is only considered unfairly prejudicial when a danger exists that marginally probative evidence will be given undue or preemptive weight by the jury.⁶⁵

During the second trial, the victim was shown photos of Defendant’s tattoos. This evidence was both relevant and probative as it went to the identification of Defendant, and evidence of identification in court can ultimately decide the fate of the trial. These photos were not used to mislead nor inflame the jury. The evidence, therefore, was not unduly prejudicial and was appropriately admitted by the trial court for its relevant and probative value.

⁶³ *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998).

⁶⁴ *Id.* at 389-390.

⁶⁵ *Id.* at 398.

As for the reference to Defendant's prior arrest, it was extremely fleeting and was inadvertent; therefore, while it was improper, no reversal is required for this mistake.⁶⁶ The facts of the case demonstrate that reference to one of Defendant's prior arrests was an unanticipated answer to prosecution's proper line of questioning. The prosecution first asked the investigating officer how Defendant was found. The officer responded that he confirmed Defendant's identity by using a system called Picture Link. He continued his answer by saying, "[a]nyone that's ever been arrested --." At that point, the prosecution stopped the officer from going any further. The inadvertent, unanticipated, and ambiguous nature of the reference to Defendant's prior arrest made any prejudicial effect innocuous and insignificant.

Furthermore, it is highly unlikely that the evidence had any bearing upon the final outcome of the case. This is highly relevant, as "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."⁶⁷ Here, defense counsel's actions were reasonable and had no effect on the judgment. The Court of Appeals noted in its majority opinion that "the prosecutor presented substantial evidence from which the jury could reasonably infer defendant's guilt."⁶⁸

Here again, Defendant makes the argument of ineffective assistance of counsel. Specifically, Defendant argues that counsel failed to object to the police officer's testimony. Again, there is a strong presumption that counsel is effective.⁶⁹ Defendant also bears the burden of showing that counsel's failure to object is not a trial strategy.⁷⁰

⁶⁶ *People v Stoudemire*, 65 Mich App 664, 669; 238 NW2d 365 (1975).

⁶⁷ *Strickland*, 466 US at 691 citing *United States v Morrison*, 449 US 361, 364-365; 101 S Ct 665; 66 L Ed 2d (1981).

⁶⁸ *Howard*, unpub op at 7.

⁶⁹ *Vaughn*, 491 Mich at 670.

⁷⁰ *LeBlanc*, 465 Mich at 578.

It is often considered a reasonable strategy to refrain from objecting to potentially improper, yet fleeting testimony, as the objection may actually draw unnecessary attention to it.⁷¹ The Court of Appeals echoed that sentiment when it noted that the defense counsel “could have soundly chosen not to object and request a limiting instruction to avoid bringing further attention to the fleeting inferences that defendant previously had been arrested or had contact with law enforcement.”⁷² The only objective conclusion from the record is that this was the defense counsel’s strategy here. As a result, Defendant’s ineffective assistance of counsel argument on these grounds cannot stand, as Defendant’s argument fails to meet the very high burden placed upon him.

⁷¹ *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995).

⁷² *Howard*, unpub op at 7-8.

Relief Requested

Therefore, the People of the State of Michigan respectfully request that this Court deny Defendant-Appellant's Application for Leave to Appeal.

Respectfully Submitted,

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